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No. 92-741

In The

Supreme Court of the United States

October Term, 1992

FEDERAL DEPOSIT INSURANCE CORPORATION,

Petitioner,

v.

JOHN H. MEYER, ET AL.,

Respondent.

**On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. Whether the Federal Savings and Loan Insurance Corporation (FSLIC) may be held liable for damages arising out of an alleged violation of the Due Process Clause pursuant to a right of action implied under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971).

2. Whether FSLIC, acting as receiver for a failed savings and loan institution, violated the Due Process Clause by dismissing an officer of the institution without affording any opportunity for a hearing.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES:

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fifth Amendment to the United States Constitution provides: "nor shall any person * * * be deprived of life, liberty, or property, without due process of law." The pertinent statutory provisions are reprinted in an appendix to this brief.

STATEMENT

1. Respondent John H. Meyer joined Fidelity Savings and Loan (Fidelity) in 1966 and remained employed until April 13, 1982, at which time he was discharged by the Federal Savings and Loan Insurance Corporation

(FSLIC). On that same day, FSLIC had been appointed receiver of Fidelity by the Federal Home Loan Bank Board. J.A. 72, 74.[1]

a. During Meyer's 16 year tenure, he was involved primarily in administration of Fidelity's multi-branch system. As of April, 1982, Meyer's position at Fidelity was Executive Vice President in charge of branch operations, a position that put him in charge of administration for 80 branches. 4 Tr. 389-90. At this position, Meyer was responsible for negotiating leases, certain personnel matters and general administrative management of the branches. Meyer never had responsibility for Fidelity's loan policies. J.A. 72-3.

b. During his tenure, Meyer received frequent promotions and commendations, and Fidelity had a general policy of terminating employees only upon a showing of good cause. Pet. 23a.

2. In 1979, Fidelity began experiencing financial difficulties as a result of its loan policies. Assuming that interest rates would fall, Fidelity sold large amounts of short-term paper in order to obtain the funds to make long-term mortgage loans at the current market rates. When interest rates rose sharply, Fidelity suffered substantial operating losses and a decrease in net worth

[1] FSLIC was abolished in 1989 when the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 183 was passed. Pursuant to Section 401(f)(2) of FIRREA 103 Stat. 356, the Federal Deposit Insurance Corporation (FDIC) was substituted for FSLIC as defendant in this suit. Thus, FDIC is the petitioner in this Court although it is the conduct of FSLIC which is the subject matter of the action. The distinction between FDIC as the current litigant and FSLIC as the party whose conduct is in question, has been preserved in this brief.

because the earnings on its low yielding portfolio were less than the increasing cost of its short-term borrowing. J.A. 73.

3. Because of these financial difficulties, on April 13, 1982, the Savings and Loan Commissioner of the State of California appointed FSLIC as state receiver. At the close of business on that date, the Commissioner seized Fidelity's assets. On that same date, the Federal Home Loan Bank Board appointed FSLIC as federal receiver of Fidelity, replacing the state receivership by operation of federal law. J.A. 74.

4. On April 13, 1982, FSLIC and its special representative, Robert Pattullo, terminated the employment of Meyer and three other Fidelity employees.

a. A letter was hand-delivered to Meyer which stated: "You are hereby discharged from all employment with Fidelity Savings and Loan Association, its subsidiaries and service corporations". 2 Tr. 100. Neither before nor after receipt of the letter was Meyer given the reasons for his termination, nor an opportunity to indicate why he should not be terminated, nor notification of any right to object to his termination, nor an opportunity to present evidence as to why the decision to terminate him should be changed. J.A. 74-5. Meyer was also denied the opportunity to appeal the decision or present evidence to challenge it in any subsequent proceeding. Pet. 3a.

b. After appointing FSLIC as receiver of Fidelity, the Federal Home Loan Bank Board created a new thrift institution, Fidelity Federal Savings and Loan of San Francisco. Most of the assets and liabilities of Fidelity were transferred to this new institution which was eventually sold to Citicorp Corporation. J.A. 74.

c. All Fidelity executive employees not terminated by FSLIC, including vice presidents, were retained by

Citicorp. 3 Tr. 193-94. Citicorp had a specific policy whereby Fidelity employees maintained their jobs at a salary scale commensurate with or higher than Fidelity's. 3 Tr. 171, Exhibit III (Deposition of Joyce Vallecorse, 12/12/85 at 16). Additionally, Citicorp continued to implement Fidelity's policy that termination would occur only for just cause. 3 Tr. 171, Exhibit III (Deposition of Joyce Vallecorse, 12/12/85 at 16). After being terminated Meyer had great difficulty in finding gainful employment. Only after three years, and moving from California to the east coast, was Meyer able to find work, and then only in a lesser position at a much reduced salary. 4 Tr. 420-23.

5. Relying on the Court's decision in *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), Meyer filed an action for damages against various defendants, including FSLIC. Meyer alleged that under California law he had a property right to continued employment with Fidelity absent just cause for dismissal. J.A. 23. He also alleged that his discharge without notice or a hearing violated his Fifth Amendment right to due process prior to a deprivation of property. J.A. 28-29.

The jury returned a verdict in favor of Meyer and against FSLIC in the amount of $130,000. J.A. 78. In a special verdict, the jury found that pursuant to California law and the facts presented, Meyer had a legitimate claim of entitlement to employment or a reasonable expectation of continued employment arising out of an implied contract with Fidelity. J.A. 77. The jury further found that FSLIC failed to provide Meyer with a hearing, the reasons for his discharge, and an opportunity to contest the reasons for his discharge before his termination. J.A. 77-8.

6. The court of appeals affirmed the jury verdict. The court rejected arguments by FDIC that the trial court lacked authority to award damages against a federal agency under *Bivens*, and that FSLIC had not violated Meyer's constitutional rights.

a. The court of appeals ruled that the sue-and-be-sued clause found in FSLIC's organic legislation constituted a general waiver of sovereign immunity. Pet. 5a.

The court acknowledged that the sue-and-be-sued clause would not provide a waiver of sovereign immunity if Meyer's claim were deemed "cognizable" under 28 U.S.C. § 1346(b), the main jurisdictional provision of the Federal Tort Claims Act (FTCA). 28 U.S.C. § 2679. However, the court noted that Section 1346(b) only refers to – and waives sovereign immunity for – governmental wrongs "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred" (28 U.S.C. § 1346(b)). Accordingly, constitutional torts, which by definition are based on the Constitution rather than local law, were found by the court of appeals to be implicitly excluded from the coverage of the FTCA. The court further held that such implicitly excluded claims are not "cognizable" under the FTCA. Pet. 6a-7a, 11a.

b. The court of appeals also concluded that Meyer's dismissal without a hearing violated due process. Pet. 21a-28a. The court held that California law provided respondent with a legitimate claim of entitlement and that under *Board of Regents v. Roth*, 408 U.S. 564, 576-77 (1972), such an entitlement was a property interest deserving of due process protection. *Id.* Noting that "federal receivership law reflects the urgency of the situation facing savings and loan institutions" and that "the right

given receivers to dispose expeditiously of burdensome contracts is an out-growth of this emergency * * * ." (Pet. 28a), the court nevertheless held that "the weight of the federal interest goes to the question of *what*, not *whether*, process is due." *Id.* The court further found that "the facts alleged in this case suggest that the FSLIC arbitrarily terminated some employees while retaining others." *Id.* Observing that Meyer was never given any opportunity to hear or be heard, the court relied on *Goss v. Lopez*, 419 U.S. 565 (1975), for the proposition that "at a minimum, Meyer must be given *some* kind of notice and afforded *some* kind of hearing – rudimentary precautions guaranteed by the due process clause." *Id.* (internal quotation marks omitted).

SUMMARY OF ARGUMENT

I. Since *Bivens v. Six Unknown Named Agents*, supra, 403 U.S. 388 (1971), the Court has authorized compensatory damages as a means to vindicate the deprivation of individual rights guaranteed by the Constitution. Sometimes referred to as constitutional tort claims, such actions were recognized in *Bivens* despite the absence of statutory authorization. While the action recognized in *Bivens* was prosecuted against individual government agents, there is no compelling reason why a constitutional tort claim should not be permitted, as by the court of appeals, against a sue-and-be-sued government entity. The logic utilized by the Court in *Bivens* to imply a damages remedy against individual government agents applies with equal force to sue-and-be-sued agencies and there are no special factors counselling hesitation which would compel the Court to stay its hand. Further, the sue-and-be-sued language in FSLIC's organic legislation represents a general waiver of sovereign immunity. As noted

by the court of appeals, since *Bivens*-type actions are based on the federal Constitution, rather than local common law, they are not cognizable under the Federal Tort Claims Act (FTCA) nor limited or diminished by its provisions.

A. The judiciary plays a special role in enforcement of individual rights guaranteed by the Constitution. While Congress has the prerogative to create a remedy for constitutional deprivations, its authority to do so is not exclusive. In the absence of Congressional action, *Bivens*-type actions are appropriately entertained by the federal courts which employ a conventional judicial remedy – compensatory damages – when no meaningful alternative remedy exists. Such actions have been used to vindicate deprivations of due process guaranteed by the Fifth Amendment such as that claimed by Meyer. *Davis v. Passman*, 442 U.S. 228 (1979).

For reasons of comity with coordinate branches of government, the Court has declined to enforce constitutional tort remedies where special factors counsel hesitation in the absence of affirmative action by Congress, or where Congress has provided an alternative remedy as a substitute for recovery directly under the Constitution. *Carlson v. Green*, 446 U.S. 14 (1980). No special factors counsel hesitation in this case, even though the action is brought against a sue-and-be-sued agency, rather than an individual agent, and Congress has not created a substitute alternative remedy.

Contrary to FDIC's assertion, the fiscal impact of a *Bivens*-type action against a sue-and-be-sued agency is similar to the impact of such an action against an individual agent. All constitutional tort claims – even those brought against individual agents – have the potential to

impact the federal fisc because individual agent defendants are routinely provided indemnity by government employers for such actions. Nor would an action against FSLIC violate the Appropriations Clause of the Constitution. Congress has appropriated funds to finance FSLIC's programs and the issues raised by this action only concern the rules that govern those appropriations. The fundamental prerogative of the Court to interpret the laws and to declare Congressional acts or conduct of the Executive unconstitutional often impacts on the federal Treasury, directly or indirectly. Even where the substantive right sued upon is grounded in statutory or constitutional provisions establishing only non-monetary duties, the Court can imply a right to damages for injuries resulting from a breach of those duties. *United States v. Mitchell*, 463 U.S. 206 (1983).

B. Sovereign immunity from this action was waived in the sue-and-be-sued clause of FSLIC's organic legislation. Such clauses are to be broadly construed as general waivers of sovereign immunity unless the suit in question is inconsistent with a statutory or constitutional scheme, an implied restriction of the general waiver is necessary to avoid a grave interference with the performance of a governmental function, or it appears plainly to have been the purpose of Congress to use the sue-and-be-sued clause in a narrow sense. *Loeffler v. Frank*, 486 U.S. 549, 554-55 (1988); *Federal Housing Administration v. Burr*, 309 U.S. 242, 245 (1940). None of these factors would dictate a narrow reading of the sue-and-be-sued clause in this case.

Congress has not provided a remedy for the constitutional deprivation claimed by Meyer. FDIC urges that the action be restricted by the limitations of the FTCA. However, sue-and-be-sued waivers are limited by the FTCA only as to claims that are "cognizable" under 28 U.S.C.

§ 1346(b). 28 U.S.C. § 2679(a). Meyer's action is implicitly excluded from – and not cognizable under – the FTCA because Section 1346(b) refers only to common law tort actions (acts wrongful "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred". (28 U.S.C. § 1346(b)).

The process due Meyer was not elaborate; he was entitled at a minimum to notice and an opportunity to present reasons, in person or in writing, why the proposed action should not be taken against him. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985). Enforcement of this minimal protection would not threaten a grave interference with a governmental function.

II. Meyer had a property interest in his job because he had a legitimate claim of entitlement to continued employment absent just cause for dismissal. This interest could not be taken from him by governmental action unless he was provided with at least minimal due process prior to his termination. While FSLIC had broad authority to act promptly in response to the circumstances surrounding a troubled financial institution, Meyer's constitutional rights could not be sacrificed to that authority. Post-deprivation contract claims suggested by FDIC as a substitute for a pre-termination hearing are illusory, at best, and would not provide Meyer the process he was due.

A. While the Constitution provides due process protection for property interests, such interests are created and their dimensions defined by independent sources such as state law. *Board of Regents v. Roth*, supra, 408 U.S. at 577. It is undisputed that under California law Meyer had an enforceable implied contract right to continued employment absent just cause for dismissal. FDIC

Br. 30. The dimensions of this implied contract right were consistent with the federal rules regulating savings and loan employee contracts (12 C.F.R. § 563.39 (in effect on April 13, 1982)) and its scope could not be diminished by the procedure established to terminate it, the Court having rejected such a "bitter with the sweet" approach in *Cleveland Bd. of Educ.*, supra, 470 U.S. at 541. Further, while FSLIC had the power to "[r]eject or repudiate any lease or contract which it consider[ed] burdensome" (12 C.F.R. § 569a.6(c)(3) (in effect on April 13, 1982)), a right of impacted individuals to notice and a meaningful opportunity to be heard must be implied when that authority is exercised. *Burns v. United States*, 501 U.S. ___, 111 S. Ct. 2182, 115 L. Ed. 2d 123, 132-3 (1991).

B. The process due Meyer was notice and an opportunity to be heard *prior to* his discharge. *Cleveland Bd. of Educ.*, supra, 470 U.S. at 542. The post-termination contract claims suggested as a substitute by FDIC are wholly illusory. Meyer's claim is based on a constitutional tort theory; that is, he claims a deprivation of due process in the procedure leading to the repudiation or rejection of his implied employment contract. Post-deprivation contract claims would have been defeated and would not have addressed the constitutional violations which are the gravamen of Meyer's claim.

ARGUMENT

I. UNDER *BIVENS* AND ITS PROGENY, A RIGHT OF ACTION FOR DAMAGES IS APPROPRIATE AGAINST SUE-AND-BE-SUED AGENCIES, SUCH AS FSLIC, CONSEQUENT UPON A DEPRIVATION OF DUE PROCESS, EVEN IN THE ABSENCE OF EXPRESS CONGRESSIONAL AUTHORITY

In *Bivens v. Six Unknown Named Agents*, supra, 403 U.S. 388 (1971), the Court found damages an appropriate remedy to vindicate the deprivation of constitutional rights. Often referred to, in shorthand, as "constitutional torts," such actions were permitted even though no statute provided for them. *Carlson v. Green*, supra, 446 U.S. at 18.

FSLIC deprived Meyer of his constitutionally-protected property interest in employment by terminating him without affording even the most rudimentary elements of due process. The conduct leading to this deprivation amounted to a constitutional tort entitling Meyer to compensatory damages. While *Bivens*-type cases have previously been permitted by this Court only against individual agents, the logic of *Bivens* would apply equally to authorize constitutional claims against sue-and-be-sued agencies, as recognized by the court of appeals. Actions against sue-and-be-sued agencies would be consistent with the judiciary's special role in enforcement of constitutional rights guaranteed to individuals and no special factors would counsel hesitation from such actions.

Sovereign immunity from Meyer's claim was waived by Congress in the sue-and-be-sued language of FSLIC's organic legislation. Moreover, the claim is not grounded in common law tort and, accordingly, is not "cognizable"

under the Federal Tort Claims Act ("FTCA"). The limitations of the FTCA relating to common law torts are inapplicable to Meyer's claim.

A. The Judiciary Has The Prerogative And Duty To Authorize Damages Against FSLIC As A Remedy For Violation Of A Constitutionally-Protected Right

1. While the Constitution preserves to the people those critical entitlements outlined in the Bill of Rights, it is generally silent on remedies available to vindicate deprivations. However, in its "great outlines" the Constitution grants to the judiciary the primary role for enforcement of individual rights. *Davis v. Passman*, supra, 442 U.S. at 241, quoting, *McCulloch v. Maryland*, 4 Wheat 316, 407, 4 L. Ed. 579 (1819). And the Court has recognized that it has the "power – and therefore the duty – to make principled choices among traditional judicial remedies" to redress or prevent constitutional violations. *Bivens v. Six Unknown Named Agents*, supra, 403 U.S. at 408, n.8 (Harlan, J., concurring). Consistent with this power and duty, the Court has implied a number of remedies to vindicate constitutional wrongs including injunctions (See, *Younger v. Harris*, 401 U.S. 37, 43-47 (1971)) and the exclusionary rule (*Mapp v. Ohio*, 367 U.S. 643, 648-50, 655-60 (1961)). And in *Bivens* the Court utilized compensatory damages to redress the violation of a Bill of Rights entitlement. The Court implied a remedy in damages despite Congressional silence and without legislative authorization.

The Court notes in *Bivens* that it had been urged to defer to state tort remedies but refused to do so. *Bivens v. Six Unknown Named Agents*, supra, 403 U.S. at 393. Distinguishing between common law torts and invasions of

constitutionally protected rights, the Court observed that an agent acting in the name of the United States has much greater capacity for harm than a private individual and that the Fourth Amendment proscribes conduct much broader than that addressed by the common law of torts. *Id.* at 392. Indeed, the interests protected by the common law of torts, and those protected by the Constitution can be inconsistent or even hostile. *Id.* at 394.

The Court had also been urged to avoid creation of a judicial remedy where Congress had not acted, at least where such a remedy was not "essential * * * or indispensable for vindicating constitutional rights". *Id.* at 406 (Harlan, J., concurring) (internal quotation marks omitted).[2] But because individual rights are central to our Constitutional democracy, the judiciary should apply "remedial mechanism[s] normally available in the federal courts" to redress injury occurring as a result of unconstitutional conduct by government agents. *Id.* at 397. " 'The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.' " *Id.* quoting *Marbury v. Madison*, 1 Cranch 137, 163, 2 L. Ed. 60, 69 (1803). In order to vindicate the violation of constitutional rights, the Court turned to the obvious and conventional remedy of compensatory damages. "That damages may be obtained for injuries consequent upon a violation of the Fourth Amendment by federal officials should hardly seem a surprising proposition. Historically, damages have

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[2] As explained at more length below, pp. 23 to 25, Meyer had no other effective remedy for the deprivation of his Fifth Amendment rights and here the remedy allowed by the court of appeals is essential and indispensable for vindication.

been regarded as the ordinary remedy for an invasion of personal interests in liberty." *Id.* at 395.

While Congress also has the prerogative to create a remedy for constitutional deprivations, unless and until Congress does so, the Court has the authority to imply a remedy because "the power to authorize damages as a judicial remedy for the vindication of a federal constitutional right" is not reserved in the Constitution "exclusively in Congress' hands." *Id.* at 401-402 (Harlan, J., concurring). Where federally protected rights are invaded, courts should be alert to adjust their remedies to grant the necessary relief to vindicate the violation and "make good the wrong done." *Bell v. Hood*, 327 U.S. 678, 684 (1946).

Indeed, the role of the Court in vindicating Bill of Rights violations is most critical in the face of Congressional silence. The Bill of Rights was created to protect the interests of the individual from inappropriate exercise of popular will as expressed by the legislative majority. *Bivens*, supra, 403 U.S. at 407 (Harlan, J., concurring). Precisely because of its self-interest, Congress might be expected to move slowly in creating remedies for constitutional deprivations where they would impact on the workings of government. Note, *Rethinking Sovereign Immunity After* Bivens, 57 N.Y.U. L. Rev. 597, 663 (1982).

The special role of the judiciary in vindicating deprivations of individual rights, even in the face of Congressional silence, has been recognized from the early days of the Republic. The Constitution does not contain the specificity of a legal code but in its "majestic simplicity" the rights of individuals are designated and in its "great outlines" the judiciary is identified as the primary means through which those individual rights are enforced. *Davis v. Passman*, supra, 442 U.S. at 241 (citation omitted). As

the Court has noted, when James Madison presented the Bill of Rights to the Congress he emphasized the particular enforcement role to be assumed by the judiciary:

> If [these rights] are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights.

Davis v. Passman, supra, 442 U.S. at 241-2, quoting I Annals of Congress 439 (1789).

In the absence of "a textually demonstrable constitutional commitment of [an] issue to a coordinate political department" it should be presumed that justiciable constitutional rights are to be enforced through the courts. *Davis v. Passman*, supra, 442 U.S. at 242 quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962). To give meaning to constitutional rights, the judiciary must be able to invoke its existing jurisdiction to award damages where there is no other effective means to vindicate wrongdoing. *Id.*

While *Bivens* concerned the Fourth Amendment, its logic has been used by the Court to imply damages as a remedy for violation of various constitutional provisions including the Due Process Clause of the Fifth Amendment. *Davis v. Passman*, supra, 442 U.S. at 242; See, also, *Bolling v. Sharp*, 347 U.S. 497 (1954); *Jacobs v. United States*, 290 U.S. 13 (1933). This implied right to damages, consequent on a violation of the Due Process Clause of the Fifth Amendment, is Meyer's only meaningful remedy and it is the gravamen of Meyer's cause of action against FSLIC.

2. In the exercise of prudent discretion and respect for coordinate branches of government, the Court has

declined to enforce constitutional tort remedies where there are "special factors counselling hesitation in the absence of affirmative action by Congress," or where Congress has provided an alternative remedy explicitly declared to be a substitute for recovery under the Constitution and viewed as being equally effective. *Bivens*, supra, 403 U.S. at 396-397; *Carlson v. Green*, supra, 446 U.S. at 18-19 (citations omitted). The authorization of an action directly against FSLIC implicates no special factors counselling hesitation and Congress has not created an equally effective substitute remedy.

FDIC suggests three special factors counselling hesitation (FDIC Br. 25-29) but none of these three, or any other factors, require the Court to stay its hand in this matter.

a. FDIC argues that a special factor counselling hesitation results from the potential impact on the federal fisc of the remedy implied by the court of appeals directly against a sue-and-be-sued agency. FDIC Br. 25-6.[3] FDIC made a similar argument in the Petition For Certiorari (Pet. 18-19). In response (Opp. to Pet., 11-12), Meyer pointed out that all *Bivens*-type actions have the potential to impact federal fiscal policy because individual agents are commonly provided indemnity by governmental employers for constitutional tort claims. See, eg., *Anderson v. Creighton*, 483 U.S. 635, 641, n.3 (1987); See, also, 28 C.F.R. § 50.15(c). While it is true that these indemnity rights are not absolute, any *Bivens* claim that results in indemnity by the government impacts, at least indirectly, on the federal Treasury.

[3] To FDIC, this action, as compared to *Bivens*, involves questions of "federal fiscal policy". *Bivens*, supra, 403 U.S. at 396, quoting *United States v. Standard Oil Co.*, 332 U.S. 301, 311 (1947).

FDIC now expands its fiscal impact argument by claiming, based upon *OPM v. Richmond*, 496 U.S. 414 (1990), that recognition of Meyer's claim would violate the Appropriations Clause (Art. I, § 9, cl. 7) of the Constitution. However, there was no consensus, among the Justices writing opinions in *OPM*, for the proposition that the Appropriations Clause would bar the Court from ordering payments from a federal agency where payment is required to remedy a violation of the Due Process Clause.

In *OPM* the Court was called upon to decide whether estoppel would apply against the government after plaintiff relied to his detriment on erroneous advice by a governmental agent regarding disability benefit entitlements. The majority was careful to limit its ruling to the particular action before it and declined to rule that an estoppel claim would never succeed against the government. *OPM v. Richmond*, supra, 496 U.S. at 423. Regarding the Appropriations Clause, the first of three separate opinions observes that Congressional decisions on appropriations could validly be set aside by the Court where, for instance, they "violate a command of the Constitution such as the Just Compensation Clause," or where Congress would indirectly violate the separation of powers by, for example, impairing "the President's pardon power by denying him appropriations for pen and paper." *Id.* at 435 (White, J., joined by Blackmun, J., concurring). In a second separate opinion the Court's reliance on the Appropriations Clause is referred to as a "red herring". *Id.* at 435 (Stevens, J., concurring). According to this view, the question presented by the case did not turn on whether an appropriation had been made, but rather, centered on the rules that govern appropriations which "cover programs – not * * * individual payments". *Id.*

Finally, in the third separate opinion it is specifically noted that the Court:

> "[d]oes not decide whether the Appropriations Clause would bar the Judiciary from ordering payments from the Treasury contrary to a statutory appropriation either where such payment would be required to remedy a violation of another constitutional provision, such as the Due Process or Just Compensation Clause, or where Congress' refusal to appropriate funds would violate separation of powers."

Id. at 437, n.* (Marshall, J., joined by Brennan, J., dissenting).

Here, as in *OPM*, the Appropriations Clause is irrelevant because Congress had appropriated funds for FSLIC, and the pertinent questions for the Court only concern the rules that govern those appropriations. Appropriations to wholly owned government corporations such as FSLIC are made on an annual basis. 31 U.S.C. § 9104.[4] These funds are appropriated pursuant to "business-type budget[s]" which estimate "the financial condition and operations of the corporation" and "contain statements of financial condition, income and expense, and sources and use of money". 31 U.S.C. § 9103(a), (b)(1) and (b)(2). Congress is charged to annually provide "necessary appropriations authorized by law" and to make "corporate financial resources available for operating and administrative expenses". 31 U.S.C. § 9104(a)(2) and (a)(3). The use of some portion of these appropriated funds to pay damages to those injured by governmental wrongs, committed in the scope of the funded programs, is not an invasion of Congressional prerogative. It is,

[4] The laws in effect in April, 1982, 31 U.S.C. §§ 847-849, were re-codified on September 13, 1982 as 31 U.S.C. §§ 9103-9104 . The recodification of Title 31 restated the law in a comprehensive form, without substantive changes. *See*, Pub. L. 97-258, § 1, Sept. 13, 1982.

rather, a proper judicial determination of how appropriated funds are to be spent when the programs are measured, as they must be, by the standards of the Due Process Clause.

More fundamentally, the Appropriations Clause should not bar the judiciary from implying a right of action against FSLIC where, as here, that cause of action is necessary to vindicate a violation of due process. Since *Marbury v. Madison* the Court has recognized that the separation of powers doctrine must be limited by the existence of judicial review. It is "emphatically the province and duty of the judicial department to say what the law is" and the Court has the authority to declare Congressional acts or conduct by the Executive unconstitutional. *Marbury v. Madison*, supra, 1 Cranch at 137.[5]

While the separation of powers doctrine requires the judiciary to "exercise a principled discretion when called upon to infer a private cause of action directly from the language of the Constitution" (*Davis*, supra, 442 U.S. at 252 (Powell, J., dissenting)), all constitutional tort claims involve review by the courts of the conduct of coordinate political departments, and in this sense the judiciary is always called upon to proceed with care when awarding

[5] In, Note, *Rethinking Sovereign Immunity After* Bivens, supra, 57 N.Y.U. L. Rev. at 661, the separation of powers doctrine, as it relates to *Bivens* actions, is discussed at length. It is persuasively argued that the separation of powers doctrine was justified and created as a precaution against "the aggregation of despotic power." *Id.* at 661. Thus, "[t]he doctrine of sovereign immunity, to the extent that it is understood as based upon the doctrine of separation of powers, must yield to the paramount justification of the separation of powers, the preservation of individual liberty." *Id.* at 662. This justification would be stood on its head were the separation of powers doctrine relied upon to bar a remedy for a deprivation of rights by a government entity which believes, as does FDIC, that it should be granted "unreviewable authority to * * * repudiate executory contracts in its sole discretion". FDIC Br. 32.

damages for such actions. *Bivens* actions have been permitted, subject possibly to qualified immunity, against a former congressman (*Davis*, supra), a cabinet officer, (*Butz v. Economou*, 438 U.S. 478 (1978)), and high ranking aides to the President (*Harlow v. Fitzgerald*, 457 U.S. 800 (1982)). Where, as here, no meaningful alternative remedy is available for a constitutional deprivation, principled discretion should be exercised in the direction of permitting damages for constitutional violations.

Moreover, in contexts other than *Bivens*-type claims, the exercise of judicial review – and the Court's role in enforcing individual rights – will often impact on the federal fisc, at least indirectly.[6] An example of a direct

[6] An example of the diverse *indirect* fiscal impact of the Court's rulings on individual rights is found in the decisions enforcing, for indigent individuals, the right to assistance of counsel during criminal proceedings. The right to assigned counsel, which clearly impacts the federal Treasury when indigent defendants are provided attorneys at government expense, was first defined as a Sixth Amendment entitlement by the Court. *Johnson v. Zerbst*, 304 U.S. 458 (1938). Only in response to the Court did Congress promulgate Federal Rule of Criminal Procedure, Rule 44. See, Original Committee Note to Rule 44; 8B, Moore's Federal Practice, ¶ 44.01[2] ["The present extent of the right to counsel has been defined recently in *Johnson v. Zerbst*, 304 U.S. 458; * * * . The rule is a restatement of the principles enunciated in these decisions."] Subsequent enlargements of the scope of the right to counsel, which further impacted the federal fisc, came not from the Congress, but rather, from the Court. When Rule 44 was amended in 1966 to expand the entitlement, the rationale for change was again attributed to recent Court decisions. 1966 Committee Note to Rule 44; 8B, Moore's Federal Practice, ¶ 44.01[3] ["A new rule is provided as a substitute for the old to provide for the assignment of counsel to defendants unable to obtain counsel during all stages of the proceeding. The Supreme Court has recently made clear the importance of providing counsel both at the earliest possible time after arrest and on appeal." [citations omitted].] While Congress now appropriates funds to provide counsel to indigents accused of crime (see, 18 U.S.C. § 3006A(i)), the original compulsion for such appropriations came from the Court.

impact on the federal Treasury of a ruling of this Court, in the absence of an express congressional appropriation, is found in *United States v. Mitchell*, 463 U.S. 206 (1983) (*Mitchell II*). There the Court implied a right to damages as a remedy for violation of the fiduciary relationship owed by the government to Native American allottees. The relevant statutory provisions established, at most, a "nonmonetary duty" and Congress had not consented to – or appropriated funds for – suits for money damages. *Id.* at 232 (Powell, J., dissenting). Nevertheless, the Court found that the statutes did create a trust relationship, that the common law of trusts established that a trustee is accountable in damages for breaches of the trust, and that "it would be anomalous to conclude that these enactments create a right to the value of certain resources when the Secretary [of the Interior] lives up to his duties, but no right to the value of the resources if the Secretary's duties are not performed." *Id.*, at 226-7. Clearly, if the common law of trusts can be the predicate for money damages, despite the absence of a Congressional appropriation, the Court has an even more compelling prerogative to order damages in this action, pursuant to the "great outlines" of the Constitution which grants to the judiciary the primary role in the enforcement of the Bill of Rights. *Davis v. Passman*, supra, 442 U.S. at 241.

The separation of powers doctrine counsels care and a principled discretion in all exercises of judicial review which, of necessity, impact on the conduct of coordinate branches of the government. However, FDIC's argument, that the legislative prerogative to appropriate funds should prohibit any unauthorized judicial act that impacts on the federal fisc, if accepted, would eviscerate

the Court's constitutional authority to enforce Bill of Rights guarantees. The argument must be rejected.

b. FDIC argues that a second factor counselling hesitation is the discretionary function exception to the FTCA which was meant to "prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." FDIC Br. 26-7, quoting *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 814 (1984). FDIC's argument that the discretionary function exception counsels hesitation must fail for two reasons. First, Meyer's claim is based not upon allegations of common law tort, but, rather, on the distinctly different theory of constitutional torts outlined in *Bivens*. Therefore, the discretionary function exception is completely irrelevant to this action. Second, and even more fundamentally, Meyer does not dispute FSLIC's authority to terminate him, nor does he claim the right to "second-guess" its administrative decisions where they were grounded upon social, economic or political policy. Rather, Meyer's claim is based upon FSLIC's failure to provide due process in the execution of those decisions.

FDIC persists in the circular argument that because Meyer claims a tort, his action is boot-strapped into the confines of the FTCA. The argument ignores the nature of Meyer's claim – that is, a *constitutional* tort as compared to a common law tort – and the accepted distinction between common law torts, which are subject to the remedies and limitations of the FTCA, and constitutional torts which are not. As explained below, at pp. 31 to 32, the distinction between common law torts and constitutional torts has been recognized by this Court, by Congress, and by the Department of Justice. The discretionary immunity of the FTCA, found at 28 U.S.C. § 2680(a), is simply inapplicable to Meyer's action.

Moreover, while FSLIC could claim immunity for discretionary, as compared to mandatory, acts under the

FTCA – a distinction that is often difficult to draw (See, eg., *United States v. Gaubert*, 499 U.S. ___, 113 L. Ed. 2d 335 (1991)) – FSLIC had no "discretion to violate the Federal Constitution" since "its dictates are absolute and imperative." *Owen v. City of Independence*, 445 U.S. 622, 649 (1980). The rationale for discretionary immunity, that is, the avoidance of judicial second-guessing of legislative or administrative acts, is incompatible with the concept of constitutional torts. A governmental entity has no discretion to violate the Constitution and when a federal court enters judgment based upon a constitutional violation it does not second-guess any governmental decision nor seek to interfere with any competing policy considerations. Rather, through judgment the court merely enforces the absolute and imperative requirements of the Constitution. *Id.* at 649.

c. Finally, FDIC argues that a special factor counselling hesitation is the existence of an "elaborate remedial mechanism fashioned by Congress". FDIC Br. 28. Had Congress fashioned an alternative remedy explicitly declared to be a substitute for recovery under the Constitution and viewed as being equally effective, principles of discretion and comity may have required the Court to stay its hand, even if the Congressional scheme offered imperfect relief. See, eg., *Schweiker v. Chilicky*, 487 U.S. 412, 425 (1988). With respect to the claims asserted by Meyer, however, Congress has not created an equally effective alternative remedy – or, indeed, any remedy at all – let alone, an "elaborate remedial mechanism". Meyer's *Bivens*-type claim is his only remedy and was properly authorized by the court of appeals.[7]

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[7] Any judicially-created constitutional tort or *Bivens*-type remedy could be supplanted by a Congressionally-created remedy aimed at vindicating the violation of constitutional rights. Thus, *Bivens* and its progeny, including this case, can be viewed as temporary remedial acts which "open * * * a dialogue with Congress" over the most appropriate way to protect individual

Those remedial mechanisms fashioned by Congress which have been found to be sufficiently elaborate to counsel hesitation include the comprehensive scheme regulating military life (*Chappell v. Wallace*, 462 U.S. 296 (1983) and *United States v. Stanley*, 483 U.S. 669 (1987)); the extensive system of rules for federal employment (*Bush v. Lucas*, 462 U.S. 367 (1983)); and the administrative structure and procedures dealing with social security which "are of a size and extent difficult to comprehend" (*Schweiker v. Chilicky*, supra, 487 U.S. at 424, citing *Richardson v. Perales*, 402 U.S. 389, 399 (1971)). In each of these cases considerable, if not fully exhaustive, alternative remedies had been provided for persons claiming constitutional violations:

> In sum, the concept of 'special factors counselling hesitation in the absence of affirmative action by Congress' has proved to include an appropriate judicial deference to indications that congressional inaction has not been inadvertent. When the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, we have not created additional Bivens remedies.

Schweiker, supra, 487 U.S. at 423.

No such mechanisms for remediation of constitutional violations were provided in the statutory or regulatory scheme under which Fidelity was seized and Meyer terminated. With surprisingly expansive rhetoric, FDIC argues that Meyer's claim "arises at the intersection of several different remedial schemes." FDIC Br. 28. What is left unsaid is that none of these alleged remedies provide any relief to Meyer, or anyone else in his circumstance,

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constitutional rights. Monaghan, *The Supreme Court, 1974 Term – Foreword: Constitutional Common Law*, 89 Harv. L. Rev. 1, 30 (1975).

and none is a mechanism created by Congress to redress constitutional violations that may occur in the course of administration of banking regulation programs. The "intersection" of supposed remedies is in fact limited to two: (1) the FTCA, which FDIC itself contends would offer no relief for Meyer's claims (FDIC Br. 26-8), and (2) Meyer's alleged right to submit a claim for a contract violation which, as explained below at pp. 44 to 47, is a wholly illusory remedy. Neither of these remedies is calculated to redress constitutional violations, and their existence hardly suggests "that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that might occur in the course of" FSLIC's administration of the federal banking laws. *Schweiker*, supra, 487 U.S. at 423. It is precisely such a circumstance, when constitutional deprivations would not otherwise be vindicated, that led the Court in *Bivens* to initially imply a judicial remedy directly under the Constitution. And here, the Court should affirm such a remedy directly against a sue-and-be-sued agency for which, as explained immediately below, sovereign immunity has been waived.

B. Sovereign Immunity From Meyer's Claim Was Waived By Congress In The Organic Legislation Creating FSLIC And Because Meyer's Claim Is Not Cognizable Under The Federal Tort Claims Act, It Is Not Barred Or Restricted By FTCA Limitations On Recovery.

The court of appeals' authorization of a *Bivens*-type suit against FSLIC directly does not violate the doctrine of sovereign immunity because sovereign immunity from such claims was waived when Congress created the agency and gave it the authority to sue-and-be-sued.

Such sue-and-be-sued clauses are broadly construed as general waivers of sovereign immunity.[8]

[8] A number of thoughtful writers have commented on the tension between *Bivens* claims and the doctrine of sovereign immunity. See, Note, *Rethinking Sovereign Immunity After* Bivens, supra, 57 N.Y.U. L. Rev. 597; Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 Harv. L. Rev. 1532 (1972); Comment, *Sovereign Immunity – An Anathema to the "Constitutional Tort,"* 12 Santa Clara Law. 543 (1972). Given the nature of the doctrine of sovereign immunity, and the underpinnings of our constitutional democracy, compelling logic should lead the Court to authorize Meyer's claim, regardless of whether there has been a Congressional waiver.

As developed at common law, the doctrine of sovereign immunity was based upon the structure of the feudal system which placed the King at a place of higher authority than any other lord. The sovereign's immunity rested on this structure and on a fiction that the King could do no wrong. *Nevada v. Hall*, 440 U.S. 410, 414-15 (1979). The fiction was rejected by the colonists in the Declaration of Independence. *Id.* at 415.

The doctrine of sovereign immunity is not constitutionally compelled. *Id.* at 428 (Blackmun, J., dissenting) [pointing to majority conclusion that "the sovereign-immunity doctrine has no *constitutional* source"]; *Edelman v. Jordan*, 415 U.S. 651, 687 (1974) (Brennan, J., dissenting); *Employees v. Department of Pub. Health & Welfare*, 411 U.S. 279, 288 (1973) (Marshall, J., concurring). The modern rationale for the doctrine of sovereign immunity is "the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends." *Nevada v. Hall*, supra, 440 U.S. at 416, quoting *Kawananakoa v. Polybank*, 205 U.S. 349, 353 (1907). While this justification may be appropriate for those rights created by Congress – where Congress is "the authority that makes the law on which the right depends"(*Id.*) – the rationale is clearly inapposite where the right being sued upon is found in the Constitution itself.

Meyer's claim is based upon a constitutional – rather than common law – tort. Constitutional torts are separate and distinct from the common law of torts and are not cognizable under the FTCA.

The source of substantive law upon which Meyer grounds his claim is the Due Process Clause of the Fifth Amendment as construed by the Court in *Bivens*. As that source is defined in *Bivens*, it "can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained." *United States v. Mitchell*, supra, 463 U.S. at 218.

1. The organic legislation creating FSLIC included 12 U.S.C. § 1725(c) (as in effect in 1982) which provided in pertinent part:

> On June 27, 1934, the [Federal Savings and Loan Insurance] Corporation shall become a body

Article III courts possess the "power – and therefore the duty – to make principled choices among traditional judicial remedies" to redress or prevent constitutional violations. *Bivens v. Six Unknown Named Agents*, supra, 403 U.S. at 408, n.8 (Harlan, J., concurring). It would be more than a little ironic for our nation – which was founded on a declaration decrying despotic acts of a sovereign – were the Court to hold that individual rights guaranteed by the Constitution could never be enforced against any government entity because of sovereign immunity. Rather, even in the absence of a waiver of sovereign immunity, "[i]f it can be shown that the government is liable for a violation of the Constitution, the logic that led the Court to conclude in *Bivens* that a damage remedy against a federal officer is within the 'judicial power' should lead to the conclusion that a similar remedy is available against the government * * * . The federal government, no less than a federal officer, is bound by the Constitution. Just as the Court may hold a federal officer liable in damages in a *Bivens*-type action, the Court may hold the federal government liable for damages for its constitutional violations." Note, *Rethinking Sovereign Immunity After* Bivens, supra, 57 N.Y.U. L. Rev. at 624-6.

> corporate, and shall be an instrumentality of the United States, and as such shall have power –
>
> * * *
>
> (4) To sue and be sued, complain and defend, in any court of competent jurisdiction in the United States * * * .

Sue-and-be-sued clauses are to be construed as general waivers of sovereign immunity unless (1) the suit in question is "not consistent with the statutory or constitutional scheme," (2) "an implied restriction of the general authority is necessary to avoid grave interference with the performance of a governmental function," or (3) "for other reasons it was plainly the purpose of Congress to use the 'sue and be sued' clause in a narrow sense." *Loeffler v. Frank*, 486 U.S. 549, 554 (1988); *Federal Housing Administration v. Burr*, 309 U.S. 242, 245 (1940). There is no reason why the sue-and-be-sued language in 12 U.S.C. § 1725(c)(4) should be narrowly read in this case.

Meyer's claim for damages based on a constitutional deprivation is consonant with the "great outlines" of the Constitution and its "majestic simplicity" in designating individual rights and identifying the judiciary as the primary means through which they are to be enforced. *Davis v. Passman*, supra, 442 U.S. at 241. And Meyer's action is not inconsistent with the statutory scheme of Congress in the FTCA. As explained below, pp. 31 to 33, Congress and the Court view constitutional torts as independent from and parallel to common law torts.

The implication of a *Bivens* remedy against FSLIC directly would not amount to a "grave interference with the performance of a governmental function." *Federal Housing Administration v. Burr*, supra, 309 U.S. at 245. The process due Meyer was minimal, "*some* kind of notice and * * * *some* kind of hearing," those "rudimentary precautions" which the Due Process Clause guarantees. *Goss v. Lopez*, 419 U.S. 565, 579, 581 (1975). See also, *Board of Regents v. Roth*, 408 U.S. 564, 569, n.7 (1972); *Boddie v. Connecticut*, 401 U.S. 371, 378-79 (1971).[9]

Finally, there is no reason to conclude that the purpose of Congress was to use the sue-and-be-sued clause in a narrow sense which would exclude claims for constitutional violations. It is true that "in the context of suits for which [Congress] provided a cause of action under the FTCA, 'sue-and-be-sued' agencies would be subject to suit only to the same limited extent as agencies whose sovereign immunity from tort suits was being waived for the first time". *Loeffler v. Frank*, supra, 486 U.S. at 562. However, as the court of appeals correctly notes, inquiry into the Congressional intent to put sue-and-be-sued agencies on equal footing with other federal agencies for purposes of the FTCA begs the " * * * very question raised by this case, namely whether constitutional torts are torts for which Congress 'provided a cause of action under the FTCA' ". Pet. 18a. The critical question is how Congress dealt with the interplay of sue-and-be-sued clauses and the FTCA. As explained at more length immediately below, Congress has provided that FTCA remedies are exclusive *only* for those claims that are *cognizable* under the act. Since constitutional torts are not cognizable under the act no Congressional intent to exclude *Bivens* claims against sue-and-be-sued agencies can be implied.

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[9] Four individuals were terminated by FSLIC at the time of the Fidelity seizure. Providing rudimentary procedural due process to those four persons would not have resulted in a grave interference with the functioning of the FSLIC, especially given the availability of suspension with pay as a method to protect the interests of the government as well as the persons being terminated. (See below at pp. 43 to 44) If deemed prudent, the use of suspension with pay could have permitted individual termination decisions to be made over a number of days or weeks, and not immediately at the time of the seizure.

2. FDIC notes that Congress has specifically provided for the interplay between sue-and-be-sued clauses and the FTCA at 28 U.S.C. § 2679(a) which provides: "[t]he authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under 28 U.S.C. § 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive."

As pointed out by FDIC, 28 U.S.C. § 1346(b) is the "principal provision" of the FTCA. FDIC Br. 13, citing *Smith v. United States*, 113 S. Ct. 1178, 1181 (1993). Section 1346(b) defines "negligent or wrongful act or omission", for purposes of the FTCA, in a manner that includes common law torts but excludes constitutional torts:

> Subject to the provisions of chapter 171 of this title, the district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages * * * caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, *under circumstances where the United States, if a private person, would be liable to claimant in accordance with the law of the place where the act or omission occurred.* [emphasis added]

The court of appeals' recognized that constitutional torts are implicitly excluded from Section 1346(b) because they are not based upon conduct which would make a private person liable to the claimant in accordance with the law of the place where the act or omission occurred. Pet. 10a. "Because 'the constitutional tort is a child of federal law, the United States is not liable for such torts under the Federal Tort Claims Act.' " Pet. 10a, quoting from Bell, *Proposed Amendment to the Federal Tort Claims Act*, 16 Harv. J. on Legis. 1, 4 (1979).

The court of appeals finding that constitutional torts are separate from common law torts, and thus not cognizable under the FTCA, is consistent with opinions by this Court, with expressed Congressional intent and with positions taken previously by the Department of Justice. The Court has observed that the common law of torts and *Bivens* create separate and distinct causes of action which are "parallel" and "complimentary." *Carlson v. Green*, supra, 446 U.S. at 20. The Court has specifically held that the FTCA was never meant to supplant constitutional torts. "[N]othing in the [FTCA] or its legislative history [shows] that Congress meant to preempt a *Bivens* remedy or to create an equally effective remedy for constitutional violations." *Id.* at 19.

Congressional intent, as gleaned from the legislative history of the Federal Employees Liability Reform and Tort Compensation Act of 1988, while not entirely enlightening, at the very least shows a Congressional understanding of the distinction between common law torts and *Bivens* or constitutional claims. As quoted by the court of appeals, the House Committee Report on that legislation provides, in part, as follows:

> [T]he term "common law tort" embraces not only those state law causes of action predicated on the "common" or case law of the various states, but also encompasses traditional tort causes of action codified in state statutes that permit recovery for acts of negligence * * * . It is well established that the FTCA applies to such codified torts * * * . *A constitutional tort action, on the other hand,* is a vehicle by which an individual may redress an alleged violation of one or more fundamental rights embraced in the Constitution.

H.R. Rep. No. 100-700, p. 6 (1988) (emphasis added) Pet. 19a, n.16.

The distinction between common law torts and constitutional torts eventually embraced in the House Committee Report came, at least in part, from testimony provided by the Department of Justice.[10] House Hearings on H.R. 4358, H.R. 3872, and H.R. 3083, 100th Congress, Second Session 78 (April 14, 1988); See, also, *United States v. Smith,* supra, 111 S. Ct. 1180, 113 L. Ed. 2d 134, 154 (1991) (Stevens, J., dissenting).

Despite the general recognition of Congress, this Court, and the Department of Justice, that common law torts and constitutional torts are separate and distinct, FDIC boot-straps an argument that since "all claims sounding in tort are 'cognizable' under the FTCA", Meyer's constitutional tort claim must also be thusly cognizable. FDIC Br. 14. FDIC's argument, like all circular arguments, falls apart, however, when the underlying premise is shown to be untrue. It is not true, that "all

[10] While the Department did not address the exact question involved in this case, that is, the waiver of sovereign immunity from constitutional torts by a sue-and-be-sued clause, in House testimony given by Robert L. Willmore, Deputy Assistant Attorney General, supporting the 1988 legislation, the following was said regarding the distinction between common law and constitutional torts: "It also is important to emphasize that [the 1988 Act] would apply only to cases alleging injury caused by ordinary common law tortious conduct. By common law tortious conduct, we mean not just causes of action based upon the 'common' or case law of the several states, but also causes of action codified in state statutes that permit recovery for negligence, such as, for example, wrongful death statutes. The term does not include, and [the proposed legislation] is not intended to apply to, cases that allege violations of constitutional rights, or what commonly are known as *Bivens* cases. Persons alleging constitutional torts will, under [the proposed legislation], remain free to pursue a remedy against the individual employee if they so choose." House Hearings on H.R. 4358, H.R. 3872, and H.R. 3083, 100th Congress, Second Session 78 (April 14, 1988).

claims sounding in tort are 'cognizable' under FTCA". *Id.* Only those wrongs for which a private person would be liable under local law are cognizable under the FTCA. 28 U.S.C. § 1346(b). Constitutional wrongs clearly do not fit within this definition. Pet.App. 10a.

FDIC points out that under *United States v. Smith,* supra, claims sounding in tort, even where barred by an FTCA exclusion, are nevertheless "cognizable" under the act. FDIC Br. 15-16. Meyer does not dispute this proposition but it is inapposite because the wrong involved in *Smith* was clearly a common law tort. Likewise, *Smith v. United States,* 113 S. Ct. 1178 (1993); *Laird v. Nelms,* 406 U.S. 797 (1972); *Hatahley v. United States,* 351 U.S. 173 (1956); *Dalehite v. United States,* 346 U.S. 15 (1953); *Hubsch v. United States,* 338 U.S. 440 (1949); which FDIC uses in various ways to advance its arguments respecting the applicability of FTCA and excluded wrongs, all deal with common law torts rather than constitutional torts or *Bivens* claims. None of these cases are determinative of the issues presented in this case.

The analysis by the court of appeals was correct. Constitutional tort claims are "implicitly" excluded from the FTCA and are not cognizable under it. Pet. 9a-11a.

3. Relying on *United States v. Testan,* 424 U.S. 392 (1976) and *United States v. Hopkins,* 427 U.S. 123 (1976) (per curiam), FDIC argues that even if Congress did waive sovereign immunity, Meyer cannot recover because he does not base his claim on substantive law "mandating compensation". FDIC Br. 23-4. FDIC is incorrect. Meyer bases his claim on his constitutional right to due process which the Court found, in *Bivens,* to be a natural predicate for money damages. Meyer's constitutional right thus mandates compensation in a manner similar to that outlined by the Court in *United States v. Mitchell,* supra, 463 U.S. 206.

FDIC's reliance on *United States v. Hopkins*, is misplaced because the brief discussion of a proposed constitutional theory in that per curiam decision is dicta. *Id.* at 130.

The *Testan* rule, that is, that a plaintiff suing the government must show both a waiver of sovereign immunity and a substantive right "mandating" compensation (*Testan*, supra, 424 U.S. at 402), was more recently examined and applied in circumstances similar to this case in *United States v. Mitchell*, supra, 463 U.S. 206 (1983) ("*Mitchell II*"). In *Mitchell II*, the Court based a finding of substantive law mandating compensation on the General Allotment Act of 1887 (25 U.S.C. §§ 331 et seq.), plus additional statutes and regulations which gave the government "full responsibility to manage Indian resources" and established a fiduciary relationship between the United States and Indian allottees. *Mitchell II*, supra, 463 U.S. at 224. Together, the statutes and regulations did not themselves mandate money damages; at most they created a "nonmonetary duty". *Id.* at 232 (Powell, J., dissenting). Nevertheless, these statutes and regulations, when viewed in conjunction with the common law of fiduciary relationships, were sufficient to create substantive law mandating compensation for purposes of a *Testan* analysis:

> Because the statutes and regulations at issue in this case clearly establish fiduciary obligations of the Government in the management and operation of Indian lands and resources, they can fairly be interpreted as mandating compensation by the Federal Government for damages sustained.

Mitchell II, supra, 463 U.S. at 226.

Similarly, here, as established by the straight-forward logic of *Bivens*, the Constitution provides an imperative that constitutional torts be vindicated by the judiciary

and that damages be utilized as the historic and conventional remedy by which this should be accomplished. Here, as in *Mitchell II*, the Constitution can be – indeed, in *Bivens*, has been – fairly interpreted as mandating compensation for the injury sustained by Meyer.

II. MEYER'S FIFTH AMENDMENT RIGHT TO DUE PROCESS WAS VIOLATED WHEN HE WAS DISMISSED WITHOUT ANY FORM OF NOTICE OR OPPORTUNITY TO BE HEARD.

Even where circumstances call for urgent government action, the Constitution's requirement of "*some* kind of notice and * * * *some* kind of hearing" – "rudimentary precautions" (*Goss v. Lopez*, supra, 419 U.S. 565) – must be afforded before protected property interests are taken. The authority given to FSLIC to set aside burdensome contracts reflected the urgency of the circumstances when a savings and loan association was found to be threatened by financial difficulties. However, as noted by the court of appeals, "the weight of the federal interest goes to the question of *what*, not *whether*, process is due" persons impacted by the seizure and subsequent actions taken. Pet. 27a.

A. Meyer Had A Legitimate Claim Of Entitlement To Continued Employment, Based Upon An Employment Contract Implied Under State Law, Which Created A Constitutionally-Protected Property Interest.

1. Meyer's right to due process was dependent on whether his employment relationship had achieved the status of a constitutionally-protected property right. Property interests are not created by the Constitution. Rather, "they are created and their dimensions are defined by existing rules or understandings that stem

from an independent source such as state law * * * ." *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972); See, also; *Cleveland Bd. of Educ. v. Loudermill*, supra, 470 U.S. 532; *Perry v. Sindermann*, 408 U.S. 593 (1972). Reference to such independent sources will determine whether a claim to continued employment is based upon "a legitimate claim of entitlement", creating a protected property interest, or results merely from "an abstract need or desire" or a "unilateral expectation." *Board of Regents v. Roth*, supra, 408 U.S. at 577. Where only a need, desire or unilateral expectation exists, no constitutionally-protected property interest is created.

The court of appeals was correct in affirming the jury finding that based on California law[11], and the history of Meyer's employment, Meyer had a legitimate claim of entitlement to continued employment absent just cause for dismissal. Indeed, FDIC acknowledges that "California law may have given [Meyer] an enforceable contractual right to continued employment * * * ." FDIC Br. 30. Contrary to FDIC's arguments, this property interest was not inconsistent with – or contrary to – federal banking law in effect at the time of Meyer's dismissal.

2. While federal banking statutes and regulations in effect in 1982 set standards applicable to employment contracts for personnel of insured institutions (See, (12 C.F.R. § 563.39 (in effect on April 13, 1982)), these standards did not prohibit an employment arrangement, such as Meyer's implied contract, which permitted termination only for cause . Further, while FSLIC was granted authority to seize and manage troubled savings and loans, and

[11] See, *Cleary v. American Airlines, Inc.*, 168 Cal. Rptr. 722 (Cal. App. 1980); *Pugh v. See's Candies, Inc.*, 171 Cal. Rptr. 917 (Cal. App. 1981); and *Foley v. Interactive Data Corp.*, 765 P. 2d 373 (Cal. 1988).

to repudiate contracts determined to be "burdensome" (12 C.F.R. § 569a.6(c)(3)(in effect on April 13, 1982)), FSLIC's prerogative cannot be construed to have been so unfettered as to have sanctioned conduct violative of constitutional entitlements. Meyer's state entitlement did not cease to exist at the moment of the regulatory seizure. Rather, it was *subject* to rejection, when and if found burdensome, and due process protections were required in the process leading to such a finding.

Nothing in federal banking laws prohibited Meyer's employment contract prior to the seizure of Fidelity. At that time, 12 C.F.R. § 563.39 provided as follows with respect to employment contracts:

> An insured institution shall not enter into an employment contract with any of its officers or other employees if such contract would constitute an unsafe or unsound practice * * * [T]he making of such an employment contract would be an unsafe or unsound practice if such contract could lead to material financial loss or damage to the insured institution or could materially interfere with the exercise by the members of its board of directors of their duty or discretion as provided by law, charter, bylaw or regulation as to the employment of an officer or employee of the institution. This may occur, depending upon the circumstances of the case, where an employment contract provides for an excessive term, or does not contain an appropriate termination for cause provision.

California law, on which Meyer bases his property right entitlement, is consistent with this regulation and closely parallels its language and intent. Where the circumstances of employment create an implied contract between employee and employer, California law contemplates that termination will be for-cause only. (*Pugh v.*

See's Candies, Inc., supra, 171 Cal. Rptr. 917; *Foley v. Interactive Data Corp.*, supra, 765 P. 2d 387-388). However, just as Section 563.39 reflects a concern that appropriate managerial discretion be reserved for savings and loan employers, so does California law:

> Essentially, [the terms "just cause" and "good cause" for dismissal] connote a fair and honest cause or reason, regulated by good faith on the part of the party exercising the power * * * Care must be taken, however, not to interfere with the legitimate exercise of managerial discretion."

Pugh, supra, 171 Cal. Rptr. at 928 (internal quotation marks and citations omitted).

FDIC's suggestion that "standard preemption principles" (FDIC Br. 32) would bar the application of California law on implied employment contracts is simply wrong. The federal regulations did not conflict with California law and both could co-exist. The court of appeals was correct in agreeing with Meyer that "it is perfectly plausible that a contract [implied under California law] contemplating dismissal only for good cause would not 'constitute an unsafe or unsound practice' under 12 C.F.R. § 563.39." Pet. 25a.[12]

[12] FDIC chose not to develop its preemption argument with any meaningful detail. In brief, however, Meyer's claim has not been preempted under either the implied or the express prong of the preemption doctrine.

Federal preemption of state law, of course, has its basis in the Supremacy Clause of the Constitution (Art. VI, cl. 2). It turns, ultimately, on the intent of Congress which may be explicitly stated in a statute or implicitly contained in the structure and purpose of the legislation. *Cipollone v. The Liggett Group, Inc.*, 505 U.S. ___, 112 S. Ct. 2608, 120 L. Ed. 407 (1992). In the absence of an express congressional statement of preemption, state law is preempted if there is an actual conflict or if federal law so occupies a field as to leave no room for the states to supplement it. *Id.*

FDIC does not appear to argue that express preemption should bar Meyer's claim. No express preemption language is noted by FDIC or has been found by Meyer. Nor is Meyer's' claim diminished by implied preemption because California law and 12 C.F.R. § 563.39 are consistent and parallel,rather than being in conflict, and there is room for both to co-exist. Meyer's claims are not barred by preemption.

FDIC does not argue, and the law would not support an assertion, that contracts such as Meyer's ceased to exist *ab initio* on the occurrence of the Fidelity seizure. Rather, with the seizure, FSLIC was granted the power to " * * * [r]eject or repudiate any lease or contract which it consider[ed] burdensome". 12 C.F.R. § 569a.6(c)(3)(in effect on April 13, 1982). And while FDIC seeks a license to operate with unfettered discretion in exercising this power, the Court has implied safeguards where, as here, governmental action results in deprivation of constitutionally-protected interests.[13]

Where Congressional legislation or Executive directives authorize deprivations of liberty or property they must ordinarily provide for due process and when they are silent the Court has implied a right of impacted individuals to notice and a meaningful opportunity to be heard. *Burns v. United States*, 501 U.S. ___, 111 S. Ct. 2182,

[13] FDIC asks the court to sanction a grant of "unreviewable authority to employ personnel as it deems appropriate and to repudiate executory contracts in its sole discretion". FDIC Br. 32. Presumably, such unreviewable prerogative would allow federal regulators to literally do anything they desired in repudiating contracts, no matter how arbitrary, and would, for instance, allow decisions based on race, age or gender. The Court should be careful to avoid sanctioning procedures which could result in such unreviewable lawlessness by government agencies.

115 L. Ed. 2d 123, 132-3 (1991); *American Power & Light Co. v. SEC*, 329 U.S. 90 (1946); *The Japanese Immigrant Case*, 189 U.S. 86 (1903). Due process requires that deprivations of protected interests be accompanied by those safeguards essential to procedural fairness. *Id.*, citing *Kent v. United States*, 383 U.S. 541, 557 (1966) [right to adversary representation in juvenile transfer proceedings]; *Greene v. McElroy*, 360 U.S. 474, 495-508 (1959) [right to confront adverse witnesses in security clearance revocation hearing]; *Wong Yang Sung v. McGrath*, 339 U.S. 33, 48-51 (1950) [right to formal hearing in deportation proceedings]. Meyer does not dispute that FSLIC had the right to terminate him upon determining that his employment contract was burdensome. However, FSLIC's broad discretion was not completely unfettered. Meyer was entitled to due process, including notice and a reasonable opportunity to be heard.[14]

[14] FDIC claims confusion as to the issue which would have been presented to the decision maker at Meyer's hearing. FDIC Br. 32, n.26. The issue would have been whether Meyer's implied employment contract was "burdensome". Had he been given the opportunity at a fair hearing, Meyer would have explained that he was in charge of branch operations, and was not involved with Fidelity's loan policies which had allegedly led to its financial difficulties. J.A. 72-3. He would have had the opportunity to show that he was an asset to the savings and loan entity and how he could have helped it function, especially in the administration of its extensive branch system, in the difficult period to follow while the institution was shepherded through the purchase and assumption transactions. While the receiver could have rejected Meyer's position and repudiated the contract despite what Meyer said (in which case, this lawsuit would not have resulted), the essence of due process entitled Meyer to "some kind of hearing" before deprivation of his property right in continued employment. *Cleveland Bd. of Educ. v. Loudermill*, supra, 470 U.S. at 542.

3. FDIC argues that its "broad statutory mandate" to "do all things desirable or expedient * * * to carry on the business of [the failed] institution" gave it the power to terminate employees at will and thus vitiated Meyer's substantive property right. FDIC Br. 29-36. This argument is inconsistent with the distinction noted by the Court between the substance of a property interest in continued employment and the procedure used to terminate employment. *Cleveland Bd. of Educ. v. Loudermill*, supra, 470 U.S. at 541. A "bitter with the sweet" approach, where the scope of the employment right is defined by the procedure used in terminating it has been rejected. *Id.* Once a protected property interest in employment has been created, the interest can be destroyed by the government only in a manner that comports with due process; that is, only where the taking allows for appropriate procedural safeguards. The substantive right cannot be limited by the procedure through which deprivation is allowed to occur.

FDIC's reliance on *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942) is misplaced. In that case relevant regulations did limit the effect of an agreement not reflected in an institution's records, so that the agreement could not be used as a defense to payment on a note. Here, by contrast, Meyer's contract would only have been limited if it had been found to be an unsafe or unsound practice. FSLIC never determined that Meyer's contract amounted to an unsafe or unsound practice and it is unlikely that any such finding could have been made.

B. Meyer Was Entitled To A Hearing Prior To His Termination. No Adequate Post-Termination Remedies Were Available To Vindicate The Deprivation Of Meyer's Protected Property Interest.

Meyer was entitled to a pre-termination hearing. Any reasonable concern by FSLIC that keeping him on the job pending such a hearing presented a risk could have been resolved by the simple expediency of suspension with pay. The post-deprivation contract remedies allegedly available to Meyer were only illusory, at best.

1. Once it is established that the Due Process Clause applies, "the question remains what process is due". *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). In employment cases, due process does not generally require an extensive or prolonged hearing. Rather, all that is required is notice and an opportunity to present reasons, in person or in writing, why the proposed action should not be taken. *Cleveland Bd. of Educ. v. Loudermill*, supra, 470 U.S. at 546; See, also, Friendly, *Some Kind of Hearing*, 123 U. Pa. L. Rev. 1267 (1975). Meyer was entitled to know why he was being terminated and to the "opportunity to present his side of the story." *Cleveland Bd. of Educ. v. Loudermill*, supra, 470 U.S. at 546. However, while the hearing need not be elaborate, the Court has made clear that except in the most extreme cases, due process requires a hearing *prior to* the deprivation; "the root requirement of the Due Process Clause [is] that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest". *Id.* at 542, quoting, *Boddie v. Connecticut* , 401 U.S. 371, 379 (1971) (internal quotation marks omitted) (emphasis in original); See also, *Board of Regents v. Roth* , supra, 408 U.S. at 577; *Perry v. Sindermann*, supra, 408 U.S. 593.

FDIC's assertion that Meyer was not entitled to a pre-termination hearing (FDIC Br. 37-40) is not supported by law or by the facts of this case. Ignoring the Court's unambiguous requirement of pre-termination hearings in employment cases (See, *Cleveland Bd. of Educ. v. Loudermill*, supra, 470 U.S. at 542), FDIC turns to *Hudson v. Palmer*, 468 U.S. 517 (1984) and *Parratt v. Taylor*, 451 U.S. 527 (1981) which involve seizure of property from incarcerated prisoners. The Court established, in this distinctly different circumstance, that a hearing after a property interest deprivation can satisfy due process where either (1) the necessity for quick action or (2) the impracticality of providing any meaningful pre-deprivation process, is coupled with (3) the availability of some meaningful process by which to assess the propriety of government action after the initial taking. None of these three characteristics were present to justify deferral of a hearing in Meyer's case until after he was terminated from employment.

While FDIC refers in general terms to the necessity for prompt action whenever "a banking institution is threatened with failure" (FDIC Br. 37), there is no showing in the record that any regulatory actions with respect to Fidelity, except the initial seizure, occurred in a rapid or accelerated fashion. Indeed, the purchase and assumption transaction was not completed until September 28, 1982, nearly six months after the seizure, when FSLIC transferred the assets and liabilities of Fidelity to its new owner, Citicorp Bank. J.A. 64. If FSLIC was concerned that a "significant hazard" resulted from Meyer's continued employment for any period after the seizure, the simple expediency of suspension with pay could have been used to preserve Meyer's right to a hearing while also protecting FSLIC's interest in promptly assuming

management of the institution. *Cleveland Bd. of Educ. v. Loudermill*, supra, 470 U.S. at 544-45.[15]

No necessity for quick action or practical considerations diminished Meyer's right to a meaningful pre-deprivation hearing, subject, possibly, to a period of suspension with pay.

2. Meyer's interest in continued employment was substantial and even if the post-termination contract remedies suggested by FDIC were not illusory, the damage had been done once the termination took place:

> [T]he significance of the private interest in retaining employment cannot be gainsaid. We have frequently recognized the severity of depriving a person of the means of livelihood. * * * While a fired worker may find employment elsewhere, doing so will take some time and is likely to be burdened by the questionable circumstances under which he left his previous job.

Cleveland Bd. of Educ. v. Loudermill, supra, 470 U.S. at 543. The stigma attached to Meyer's termination was exacerbated by the fact that it occurred during a regulatory take-over by the government, leaving the impression on any prospective employer that Meyer must have engaged in some kind of wrong-doing. Given his work experience, Meyer was left after termination with little option but to seek employment in the banking or savings and loan fields. But employers in those highly-regulated industries

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[15] The Court in *FDIC v. Mallen*, 486 U.S. 230 (1988), considered the right to a hearing in just such a circumstance. There, the thrift officer had been suspended and was later afforded a post-suspension hearing, the adequacy of which was the subject of the Court's opinion. Because of the obvious difference between these facts and Meyer's circumstances, involving termination rather than suspension, FDIC's reliance on the case is misplaced. (FDIC Br. 38-9).

would be very cautious about hiring a person who had previously been terminated by federal regulators.

FDIC disingenuously suggests that Meyer had two distinct post-termination remedies, presenting a claim with or filing a lawsuit against the estate of Fidelity for breach of contract. FDIC Br. 40-43.

The actions contemplated are variously described as "a claim with the receiver for the value of any contractual rights he believes to have been violated" (FDIC Br. 40) and "a claim in federal court against the receiver for breach of contract" (FDIC Br. 42). In either case, the putative contract remedies are based generally on *Coit Independence Joint Venture v. FSLIC*, 489 U.S. 561 (1989). An analysis of that case demonstrates why the supposed remedies are illusory at best.

Coit dealt with the question of how an existing lawsuit, claiming pre-seizure wrongful conduct by a failed savings and loan, was to be handled after the FSLIC became receiver for the association. In that context the receiver steps into the shoes of the failed association. Claims for pre-seizure wrongs are satisfied out of available assets of the seized entity, to the extent that they exist. *Id.* at 571. *Coit* stands for the proposition that FSLIC is not empowered to adjudicate the pre-existing claim, and that the plaintiffs were entitled to a de novo consideration in federal court. *Id.* at 564. *Coit* is distinguishable and its holding is not helpful to the issues raised by Meyer's claim.

As compared to the plaintiff in *Coit*, Meyer does not have a claim based on wrongful conduct *by the association*. Meyer had an employment contract with Fidelity Savings, but Fidelity did not terminate Meyer. He was, instead, terminated by FSLIC. FDIC suggests that Meyer throw it into the briar patch of a contract claim because Meyer cannot prevail on such a claim. If Meyer had

presented a claim or sued FSLIC as receiver for breach of contract, his claim would have been denied, and then defended on the basis that FSLIC didn't breach any contract and, indeed, had discretion to "[r]eject or repudiate any lease or contract which it consider[ed] burdensome". 12 C.F.R. § 569a.6(c)(3)(in effect on April 13, 1982). On the other hand, if the claim now contemplated by FDIC had been based on the conduct of Fidelity, the former employer, a complete defense would have resulted from the fact that Fidelity did not terminate Meyer's employment.[16]

In the final analysis, FDIC does not understand, or refuses to acknowledge, the basis of Meyer's claim. Meyer's claim is not one for breach of contract and Meyer does not claim that his implied employment contract could not have been rejected or repudiated by FSLIC, if it were found to be burdensome. Rather, Meyer's claim is one for damages due to a constitutional tort. Meyer was injured when he was denied due process in the procedure which led to the determination that his contract was burdensome and was to be rejected. The court of appeals understood and correctly affirmed the validity of Meyer's claim.[17]

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[16] In addition, *Coit* is quite clear in holding that such claims would be satisfied only to the extent that there are association assets available to do so. *Coit*, supra, 489 U.S. at 571-2. The record in this case fails to demonstrate that there were any assets left, after the transfer of most of the association's assets and liabilities to Citicorp (J.A. 74), with which Meyer could be compensated even if a contract claim could have been successfully brought.

[17] FDIC responds to the court of appeals by commenting that Meyer's right was not retrospectively annulled; rather it never existed in the first place because of "the right of the federal banking receiver to employ such personnel as it deems

The suggested contract claims are wholly illusory and authorization of damages directly under the Fifth Amendment is appropriate because otherwise the deprivation of Meyer's property interest by FSLIC will not be vindicated.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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appropriate or to repudiate executory contracts". FDIC Br. 34. This, again, begs the question involved in this case; that is, whether the receiver had to comport with due process in exercising its discretion to repudiate Meyer's contract if the contract were deemed burdensome.

APPENDIX A

STATUTORY PROVISIONS

1. 12 U.S.C. 1725(c) (In Effect on April 13, 1982) provides:

The [Federal Savings and Loan Insurance] Corporation shall become a body corporate, and shall be an instrumentality of the United States, and as such shall have power –

* * *

(4) To sue and be sued, complain and defend, in any court of competent jurisdiction in the United States or its Territories or possessions or the Commonwealth of Puerto Rico, and may be served by serving a copy of process on any of its agents or any agent of the Federal Home Loan Bank Board and mailing a copy of such process by registered mail or by certified mail to the Corporation at Washington, District of Columbia.

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2. 31 U.S.C. 9103 provides:

(a) Each wholly owned Government corporation shall prepare and submit each year to the President a business-type budget in a way, and before a date, the President prescribes by regulation for the budget program.

(b) The budget program for each wholly owned Government corporation shall –

(1) contain estimates of the financial condition and operations of the corporation for the current and following fiscal years and the condition and results of operations in the last fiscal year;

(2) contain statements of financial condition, income and expense, and sources and use of money, an analysis of surplus or deficit, and additional statements and information to make known the financial condition and operations of the corporation, including estimates of operations by major activities, administrative expense, borrowings, the amount of United States Government capital that will be returned to the Treasury during the fiscal year, and appropriations needed to restore capital impairments; and

(3) provide for emergencies and contingencies and otherwise be flexible so that the corporation may carry out its activities.

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3. 31 U.S.C. 9104 provides:

(a) Congress shall –

(1) consider budget programs for wholly owned Government corporations the President submits;

(2) make necessary appropriations authorized by law;

(3) make corporate financial resources available for operating and administrative expenses;

* * *

(b) This section does not –

(1) prevent a wholly owned Government corporation from carrying out or financing its activities as authorized under another law;

* * *

(3) affect the authority of a wholly owned Government corporation to make a commitment without fiscal year limitation.

APPENDIX B

REGULATIONS

1. 12 C.F.R. 563.39 (In Effect on April 13, 1982) provides:

An insured institution shall not enter into an employment contract with any of its officers or other employees if such contract would constitute an unsafe or unsound practice. Section 545.25 – 1 of this chapter contains the requirements of the Board as to employment contracts by Federal savings and loan associations with their officers. The making of an employment contract by an insured institution other than a Federal association with any of its officers or employees will not be considered to be an unsafe or unsound practice merely for the reason that the contract varies from the requirements of section 545.25 – 1. However, the making of such an employment contract would be an unsafe or unsound practice if such contract could lead to material financial loss or damage to the insured institution or could materially interfere with the exercise by the members of its board of directors of their duty or discretion provided by law, charter, bylaw or regulation as to the employment or termination of employment of an officer or employee of the institution. This may occur, depending upon the circumstances of the case, where an employment contract provides for an excessive term or does not contain an appropriate termination for cause provision.

2. 12 C.F.R. 569a.6(c) (In Effect on April 13, 1982) provides:

* * *

(c) *Assets, claims and contracts.* The Receiver shall have power to:

(1) Sell for cash or on terms, exchange, or otherwise dispose of, in whole or in part, any or all of the assets and property of the institution, real, personal and mixed, tangible and intangible, of any nature, including any mortgage, deed of trust, chose in action, bond, note, contract, judgment, or decree, share or certificate of share of stock or debt, owing to such institution or the Receiver.

(2) Surrender, abandon, and release any choses in action, or other assets or property of any nature, whether the subject of pending litigation or not, and settle, compromise, modify, or release, for cash or other consideration, claims and demands in favor of the institution or the Receiver.

(3) Reject or repudiate any lease or contract which it considers burdensome * * *